Supreme Court, U. S.
FILED
MAY 13 1980
DAK, JR., CLERK

No. 79-1136

In the Supreme Court of the United States

OCTOBER TERM, 1979

BROWN & ROOT, INC. AND
TRAVELERS INSURANCE COMPANY, PETITIONERS

v.

MARY M. JOYNER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

JOSHUA T. GILLELAN II
MARY-HELEN MAUTNER
KERRY L. ADAMS
Attorneys
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Fusco v. *Perini North River Assoc.*, 601 F.2d 659, vacated and remanded, No. 79-759 (Jan. 14, 1980)	11, 12
Jacksonville Shipyards, Inc. v. *Perdue*, 539 F.2d 533	10, 11, 13
Newport News Shipbuilding & Dry Dock Co. v. *O'Hearne*, 192 F.2d 968	6
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249	6, 8, 10, 11
P.C. Pfeiffer Co. v. *Ford*, No. 78-425 (Nov. 27, 1979)	10, 11
Thibodaux v. *Atlantic Richfield Co.*, 580 F.2d 841, cert. denied, 442 U.S. 909	10, 11
Travelers Insurance Co. v. *Branham*, 136 F.2d 873	6
Travelers Insurance Co. v. *McManigal*, 139 F.2d 949	6
Walter Tantzen, Inc. v. *Shaughnessy*, 601 F.2d 670, vacated and remanded, No. 79-1329 (Apr. 21, 1980)	11
Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957, cert. denied, 429 U.S. 868	9, 11, 12

Statute: Page

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 5

Section 2(3), 33 U.S.C. 902(3) 2, 5, 8, 9, 10, 11, 12

Section 2(4), 33 U.S.C. 902(4) 11

Section 3(a), 33 U.S.C. 903(a) 2, 3, 5, 7, 8, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1136

BROWN & ROOT, INC. AND
TRAVELERS INSURANCE COMPANY, PETITIONERS

v.

MARY M. JOYNER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-7) is reported at 607 F.2d 1087. The original opinions of the Benefits Review Board (Pet. App. A-8 to A-22) are reported at 7 B.R.B.S. 356 and 7 B.R.B.S. 608. The administrative law judges' original decisions (Pet. App. A-24 to A-35) are re-

ported at 5 B.R.B.S. (ALJ) 37 and 5 B.R.B.S. (ALJ) 42; their decisions on remand from the Board (Pet. App. A-36 to A-44) are not reported. The Board's opinions on petitioners' appeals from the awards entered on remand (Pet. App. A-45 to A-48, A-50 to A-53) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1979. The petition for a writ of certiorari was filed on January 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether workers engaged in the construction of a dry dock are "engaged in maritime employment" and are therefore "employees" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether a dry dock and an adjacent shipyard, during their construction, qualify as "navigable waters of the United States," within the meaning of Section 3(a) of the Act.

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

Section 3(a) of the Act, 33 U.S.C. 903(a), provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). * * *

STATEMENT

Newport News Shipbuilding & Dry Dock Co. hired petitioner Brown & Root as an independent construction contractor to build new shipbuilding and dry dock facilities, known as the "North Yard," adjacent to Newport News Shipbuilding's existing shipyard (Pet. App. A-26). Respondent Benjamin Stewart was injured, and Arthur Joyner, husband of respondent Mary Joyner, was killed while engaged in the construction of the new graving dry dock at the North Yard (Pet. App. A-4, A-9, A-20 to A-21).

The new facilities were constructed on a site that was formerly a navigable part of the James River (Pet. App. A-4, A-26). Brown & Root began con-

struction by building a seawall to enclose part of the river. Arthur Joyner, Brown & Root's excavation foreman, was killed in May 1975 during the process of filling in the bulkheaded area of the river. Sand from channel-dredging operations was brought up the river by barge, mixed with water, and pumped into a "reclaiming pit" in the bulkheaded area (*id.* at A-4, A-26, A-32). After the sand settled and the water drained, earth-moving equipment carried the sand wherever it was needed as fill material. During the process of placing sand as backfill to support the partially completed concrete walls of the new dry dock, an earth-moving machine became mired in the reclaiming pit. While directing the operations to free the earth-mover, Joyner was struck by the machine and killed (*id.* at A-4, A-21).

Benjamin Stewart worked for Brown & Root as a painter and sandblaster in all areas of the North Yard project (Pet. App. A-27). His job included sandblasting barnacles and sea grass from pilings on the interior of the incomplete graving dry dock (*id.* at A-9). His work was based at the project's "paint shed," which was moved from one location to another within the new Yard as construction progressed (*id.* at A-27). At the time of his injury in March 1976, the project was approximately 60% complete, and the shed was located approximately 100 feet from the bulkhead that established the new edge of the river (*id.* at A-26 to A-27). Stewart injured his back when he loaded a heavy generator, which had been housed at the shed, onto a truck for

immediate transfer to the uncompleted graving dock (*id.* at A-4, A-9, A-27).

Petitioners paid respondents Stewart and Joyner workers' compensation benefits under Virginia law, but opposed their claims for the higher benefits payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Petitioners maintained that respondents failed to satisfy the "status" test in Section 2(3) of the Act, 33 U.S.C. 902(3), and the "situs" requirement in Section 3(a) of the Act, 33 U.S.C. 903(a). The administrative law judges who heard the two cases agreed that neither test was met and denied the claims (Pet. App. A-24 to A-35).

The Benefits Review Board reversed the administrative law judges' rulings (Pet. App. A-8 to A-22). On the "status" question, the Board held that Joyner and Stewart were "harborworkers," and hence "engaged in maritime employment," within the meaning of Section 2(3). The Board ruled that the statutory term "harborworker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships)" (Pet. App. A-16 to A-17). The Board also held that the Act's "situs" requirement was satisfied because, "[a]t the time of [their] injur[ies], claimant[s were] in an area which, upon completion of construction, would qualify under Section 3(a) as an 'adjoining area customarily used

by an employer in * * * building a vessel'" (*id.* at A-17). The Board ruled that "[t]he incomplete state of the North Yard Project will not prevent claimant[s] from passing the 'situs' test" (*ibid.*).

In reaching its conclusions, the Board relied on cases decided by the Fourth Circuit before the extension of the Act's coverage in 1972. *Travelers Insurance Co.* v. *Branham*, 136 F.2d 873 (1943); *Travelers Insurance Co.* v. *McManigal*, 139 F.2d 949 (1944); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F.2d 968 (1951). The Board reasoned that the 1972 amendments were intended to expand the Act's coverage and did not exclude any employees who formerly would have been covered (Pet. App. A-12, A-22). Because the pre-1972 cases established that employees engaged in the construction or repair of a dry dock were covered by the Act, and because the 1972 amendments were intended "to provide continuous coverage throughout their employment to * * * workers who [otherwise] would be covered only for part of their activity" (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977)), the Board concluded that dry dock construction workers injured in or near the facility under construction are covered by the amended Act (Pet. App. A-13 to A-14). The Board therefore directed the administrative law judges to enter compensation awards for both claimants.

The court of appeals upheld the finding of coverage and affirmed the compensation awards entered by the administrative law judges on remand from the

Board. The court of appeals specifically declined to decide the correctness of the Board's ruling that no one who would have been covered under the original Act is excluded from coverage under the 1972 amendments (Pet. App. A-6). The court agreed with the Board, however, that pre-1972 decisions establishing the maritime character of particular kinds of employment are relevant in determining the extent of coverage under the amended Act (*id.* at A-5 to A-6). The court of appeals reaffirmed its holding under the original Act that "a dry dock is peculiarly a maritime facility" and therefore that "employees building and repairing dry docks are engaged in maritime employment" (*id.* at A-6). The court further ruled that "employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments" (*ibid.*).

Similarly, the court of appeals agreed that Stewart and Joyner met Section 3(a)'s "situs" requirement. The court noted that, even before the 1972 amendments, it had held that "the site of a dry dock, which was formerly navigable water and would be used against in support of navigation, remained a part of the navigable waters of the United States during construction of the dock" (Pet. App. A-7). The court ruled that the 1972 amendments "did not change this interpretation of the Act," but that the amendments did establish that "the shipyard adjacent to the dry dock is also part of the navigable waters" (*ibid.*).

ARGUMENT

1. The decision of the court of appeals is correct and does not conflict with the decisions of any other circuit. Contrary to petitioners' assertion, this case presents only the narrow question of coverage for workers constructing dry docks at a new shipyard, a question that only the Fourth Circuit has considered. As the court of appeals recognized (Pet. App. A-6), this case does not require resolution of the broad question whether all injuries for which compensation was available under the original Act remain compensable under the 1972 amendments. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977). Rather, both injured workers were harborworkers employed in the construction of a shipbuilding facility adjacent to a navigable waterway. They were engaged in a traditional form of "maritime employment" that remains "maritime employment" within the meaning of Section 2(3) of the Act, and their injuries occurred on the "navigable waters of the United States" within the meaning of Section 3(a). This case therefore does not present an occasion to decide any general issue regarding the 1972 amendments' coverage of persons who work on or near the water in a non-cargo-handling capacity. Review by this Court is not warranted.

In construing the "maritime employment" requirement of Section 2(3), the court of appeals properly relied on its pre-1972 case law holding that the building or repair of a dry dock is a "maritime" function.

See the cases cited at page 6, *supra*. The court acknowledged that, before 1972, coverage under the Act did not depend on whether the injured worker satisfied the "maritime employment" status test now included in Section 2(3). Nonetheless, the court stated that the cited pre-1972 cases retain their precedential value, because (Pet. App. A-6):

> [w]e did not base coverage on the simple proposition that the employers were engaged in maritime commerce. Instead, we examined the work of the individual claimants and concluded that it was maritime employment. In reaching this decision, we emphasized that a dry dock is peculiarly a maritime facility.

Contrary to petitioners' assertion, none of the decisions on which they rely (Pet. App. A-11 to A-12) conflicts with the court of appeals' ruling that employees building a dry dock are engaged in "maritime employment." The cases cited merely held that employees engaged in certain types of work—different from that of Stewart and Joyner— were not engaged in "maritime employment" within the meaning of Section 2(3). In *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), for example, the court held that the amended Act did not cover a lumber mill "pond man" who was injured on a floating walkway on a bay while sorting floating logs that had arrived at the mill by water and pushing them onto a conveyor that pulled them into the mill. The court reasoned that the worker's employment was not "maritime" in a traditional

sense. Similarly, in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), the court ruled that an oil field worker who could only reach a particular job site by boat was not "engaged in maritime employment" when he drowned en route to the site. And in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 542-543 (5th Cir. 1976), the court held that a worker named Charles Skipper, injured in the course of dismantling a building in a former shipyard so that it could be transported and reassembled for use at an inland industrial site, was not "engaged in maritime employment" at the time he was hurt.[1] None of these opinions questioned the "maritime" character, for purposes of Section 2(3), of employment that had been established as "maritime" under traditional prin-

[1] As petitioners observe (Pet. 12 n.3), Skipper was the only one of the five workers involved in *Jacksonville Shipyards* whose case did not come to this Court. The recent decisions in *Northeast Marine Terminal Co.* v. *Caputo, supra*, and *P.C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979), cast doubt on the continued validity of the court of appeals' ruling with respect to Skipper. He was a ship repairman who satisfied the status requirement in Section 2(3) by virtue of his occupation, which was one of those specifically mentioned in the statute. This Court's decisions establish that Section 2(3) focuses on particular occupations and that persons engaged in those occupations are covered by the Act, regardless of their particular duties at the time of injury. A person engaged in one of the occupations listed in Section 2(3) does not walk into and out of coverage according to the task he is assigned at a given moment. *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 272-274; *P.C. Pfeiffer Co.* v. *Ford, supra*, slip op. 14.

ciples. Even if *Weyerhaeuser*, *Thibodaux*, and *Jacksonville Shipyards* (*Skipper*) were correctly decided, they do not detract in any way from the result reached in this case.[2] Stewart and Joyner were "har-

[2] As petitioners emphasize (Pet. 15, 20-22), the court of appeals' approach in *Weyerhaeuser* differs substantially from the reasoning in *Fusco* v. *Perini North River Assoc.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, No. 79-759 (Jan. 14, 1980). *Weyerhaeuser* held that an employee is engaged in "maritime employment" within the meaning of Section 2(3) only if his job bears "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' " (528 F.2d at 961). *Fusco*, on the other hand, stressed that the 1972 amendments were intended to expand the coverage of the Act and held that "any person whose principal duties are performed on navigable waters as that term was understood before 1972" is covered by the amended statute, regardless of the nature of his work. 601 F.2d at 669.

This Court has remanded *Fusco* for reconsideration by the court of appeals, because the Second Circuit's *exclusively* geographical approach and its misapplication of Section 2(4)'s definition of a statutory "employer" conflict with the interpretation of the Act adopted in *Northeast Marine Terminal Co.* v. *Caputo, supra, and P.C. Pfeiffer Co.* v. *Ford, supra.* See also *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), vacated and remanded, No. 79-1329 (Apr. 21, 1980).

We believe that the Ninth Circuit's rationale in *Weyerhaeuser* is also deficient, but for different reasons. *Weyerhaeuser*'s restrictive reading of the "maritime employment" requirement in Section 2(3) ignores the congressional intent to expand the Act's coverage in 1972 and gives insufficient weight to the place of an injury's occurrence in determining whether a worker was engaged in maritime employment at the time he was hurt.

Because Stewart and Joyner were engaged in an occupation that not only is explicitly listed in Section 2(3) but also quali-

borworkers" under Section 8(3), and that is all that is necessary to satisfy the status requirement of the amended Act.

2. The court of appeals correctly determined that Section 3(a)'s situs requirement was satisfied, because Joyner and Stewart sustained their injuries "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." The court ruled that the statutory definition of "navigable waters" includes dry docks and adjacent shipyard areas that are under construction, especially when the construc-

---

fies as "maritime employment" under traditional definitions developed before 1972, this case presents no occasion for the Court to reconcile the disparate approaches followed in *Weyerhaeuser* and *Fusco*. Moreover, in addition to the Second Circuit's reconsideration on remand in *Fusco*, the Ninth Circuit will soon have its first opportunity since *Weyerhaeuser* to consider the application of the Act to workers not involved in cargo-handling activities. Three cases involving injuries to marine construction workers are currently pending in the Ninth Circuit, and the court of appeals' decisions there, rendered in light of the substantial intervening litigation in this Court and elsewhere, may well confine *Weyerhaeuser* to its peculiar facts and eliminate any important differences between the Ninth Circuit and other courts of appeals. See *Nold* v. *Guy F. Atkinson Co.*, Nos. 79-7109, 79-7127; *Massman Construction Co.* v. *Silva*, No. 79-7129; and *Ramos* v. *Universal Dredging Corp.*, Nos. 79-7257, 79-7285, 79-7302. Intervention by this Court ultimately may prove necessary, but it should await further developments in the courts of appeals.

tion site is located on land reclaimed from actual navigable waters, as in this case.

In support of their position with respect to the situs requirement, petitioners cite only *Jacksonville Shipyards, Inc.* v. *Perdue*, *supra*. The Fifth Circuit there held that Skipper's injury did not occur on the "navigable waters of the United States" within the meaning of Section 3(a). Skipper was injured at a former shipyard facility that had not been used for approximately a year (539 F.2d at 542-543). The Fifth Circuit's decision is readily distinguishable from the ruling below. Joyner and Stewart were working in an area that was formerly part of a navigable river. The area was being converted into a shipyard and dry dock, facilities that unquestionably fall within Section 3(a)'s definition of "navigable waters." The only question, then, is whether the area continued as "navigable waters" without interruption during the construction process. By contrast, in *Jacksonville Shipyards*, the question was whether an area could retain its "navigable waters" character a year after its use as a shipyard had ended. No future plans regarding the shipyard were involved, and the yard was not in the process of conversion from one form of "navigable waters" to another. To be sure, the court of appeals in *Jacksonville Shipyards* stated that the situs of injury must meet the statutory requirements at the time of the injury and that "[i]t will not suffice if the area was so used [as 'navigable waters'] only in the past, or if such uses

are merely contemplated for the future." 539 F.2d at 541. But the reference to future maritime use was *dictum*, because there was no such planned usage in the case before the court. And, in any event, the Fifth Circuit did not consider a factual situation like that presented here, in which acceptance of petitioners' argument would mean that an area indisputably within the statutory coverage would temporarily lose its character as "navigable waters" solely because its owner sought to convert it to a different use also falling clearly within the statutory definition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

JOSHUA T. GILLELAN II
MARY-HELEN MAUTNER
KERRY L. ADAMS
Attorneys
Department of Labor

MAY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 319866 305